

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARTY K.,

Plaintiff,

CASE NO. C19-5953-MAT

V.

ANDREW M. SAUL,
Commissioner of Social Security.

Defendant.

**ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL**

Plaintiff proceeds through counsel in his appeal of a final decision of the Commissioner of Social Security Administration (Commissioner). The Commissioner denied Plaintiff's applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) after hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is REVERSED and ANDED for further administrative proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1968.¹ He has a high school diploma, and has worked as a

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 carpenter. (AR 70, 80.)

2 Plaintiff applied for DIB and SSI in October 2016 and February 2017, respectively. (AR
3 316-24.) Those applications were denied and Plaintiff timely requested a hearing. (AR 245-51,
4 255-63.)

5 On October 4, 2018, ALJ Allen G. Erickson held a hearing, taking testimony from Plaintiff
6 and a vocational expert (VE). (AR 87-137.) On November 16, 2018, the ALJ issued a decision
7 finding Plaintiff not disabled. (AR 13-23.) Plaintiff timely appealed. The Appeals Council denied
8 Plaintiff's request for review on August 23, 2019 (AR 1-6), making the ALJ's decision the final
9 decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this
10 Court.

JURISDICTION

12 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

14 The Commissioner follows a five-step sequential evaluation process for determining
15 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
16 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
17 engaged in substantial gainful activity since March 27, 2015, the alleged onset date. (AR 15.) At
18 step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ
19 found severe Plaintiff's seizure disorder, alcohol dependence, major depressive disorder,
20 neurocognitive disorder, and generalized anxiety disorder. (AR 15-16.) Step three asks whether
21 a claimant's impairments meet or equal a listed impairment. The ALJ found that Plaintiff's
22 impairments did not meet or equal the criteria of a listed impairment. (AR 16-17.)

23 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess

1 residual functional capacity (RFC) and determine at step four whether the claimant has
2 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
3 performing light work with additional limitations: he cannot climb ladders, ropes, and scaffolds,
4 but can occasionally climb stairs and ramps. He cannot be exposed to hazards, such as open water,
5 open flame, open heights, and open machinery, and cannot perform commercial driving. He can
6 occasionally balance and be exposed to temperature and humidity extremes. He can be
7 occasionally exposed to vibration. He can understand, remember, and apply detailed, but not
8 complex, instructions. He cannot work in a fast-paced, production-type environment. He can have
9 occasional interaction with the general public. (AR 17.) With that assessment, the ALJ found
10 Plaintiff unable to perform past relevant work. (AR 21.)

11 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
12 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
13 adjustment to work that exists in significant levels in the national economy. With the assistance
14 of the VE, the ALJ found Plaintiff capable of transitioning to other representative occupations,
15 including mail room sorter, office helper, and small products assembler. (AR 21-22.)

16 This Court's review of the ALJ's decision is limited to whether the decision is in
17 accordance with the law and the findings supported by substantial evidence in the record as a
18 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
19 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
20 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
21 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
22 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
23 2002).

1 Plaintiff argues the ALJ erred in (1) assessing certain medical opinions, (2) discounting his
 2 subjective symptom testimony and the lay evidence, and (3) relying on VE testimony at step five
 3 that contradicts the Dictionary of Occupational Titles (DOT).² The Commissioner argues that any
 4 errors in the ALJ's decision are harmless, and that the disability determination is supported by
 5 substantial evidence and should be affirmed.

6 Medical opinions

7 Plaintiff assigns error to several aspects of the ALJ's assessment of the medical evidence.
 8 The Court will consider each argument in turn.

9 Legal standards

10 Where contradicted, a treating or examining doctor's opinion may not be rejected without
 11 "specific and legitimate reasons" supported by substantial evidence in the record for so doing."
 12 *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (quoting *Murray v. Heckler*, 722 F.2d 499,
 13 502 (9th Cir. 1983)).

14 State agency opinions

15 Plaintiff notes that the ALJ's decision does not mention the State agency opinions. On
 16 initial review, a State agency psychological consultant opined that Plaintiff "should not work
 17 closely with the general public or many coworkers" (AR 180) and the ALJ did not include any
 18 restriction on Plaintiff's co-worker interactions in the RFC assessment. (AR 17.) The State agency
 19 consultant also opined that Plaintiff would "do best with routine work" (AR 180), but the ALJ
 20 instead found Plaintiff capable of performing detailed but not complex instructions. (AR 17.)

21
 22 ²Because, as explained *infra*, this case must be remanded due to errors in the ALJ's assessment of
 23 medical evidence, the Court need not address the alleged errors in the step-five findings in the current
 decision as those findings may be reformulated on remand.

1 Upon reconsideration, the State agency consultant found Plaintiff capable of interacting
2 with others on an “occasional/superficial” basis, and also found that Plaintiff had adaptation
3 limitations but could adapt to normal, routine changes in the workplace, and could follow goals
4 set by an employer, but could not set his own goals. (AR 221.) None of these limitations was
5 included in the ALJ’s RFC assessment. (AR 17.)

6 The Commissioner concedes that the ALJ erred in failing to assess the State agency
7 opinions, but argues that the error is harmless because the jobs identified at step five are not
8 inconsistent with the restrictions described by the State agency opinions. Dkt. 29 at 2-6. The
9 restrictions at issue in the State agency opinions, however, are not clearly delineated in the DOT
10 definitions of the step-five jobs, however: the DOT does not explicitly indicate whether particular
11 jobs require superficial interaction or “close work”, or involve routine changes or independently-
12 set goals. The Court declines the Commissioner’s invitation to speculate whether particular jobs
13 involve those activities, based upon the DOT’s description of job tasks or based on “common
14 experience” (Dkt. 29 at 4), particularly because the ALJ has a duty to assess medical opinions and
15 bears the burden at step five to identify jobs that claimants can perform despite their restrictions.

16 Because the ALJ failed to assess the State agency opinions in this case and failed to account
17 for all of the limitations set out in those opinions in the RFC assessment, and it is not clear that the
18 jobs identified at step five are nonetheless consistent with the State agency opinions, this case must
19 be remanded to permit the ALJ to assess the State agency opinions.

20 Loreli Thompson, Ph.D.

21 Dr. Thompson examined Plaintiff in April 2016 and wrote a narrative report describing his
22 symptoms and limitations. (AR 558-64.) Dr. Thompson opined that Plaintiff’s memory,
23 concentration and persistence functions were “inconsistent,” and had “limited” social functioning.

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL
PAGE - 5

1 (AR 564.) Dr. Thompson also found that Plaintiff's ability to adapt to workplace changes was
 2 "likely to be impacted[.]" (*Id.*) The ALJ indicated that he gave "some weight" to Dr. Thompson's
 3 opinion, but found that her opinion did not identify specific functional limitations, but spoke "only
 4 in generalities." (AR 20.)

5 Plaintiff contends that the ALJ's reasoning is too vague (Dkt. 28 at 5), but the Court
 6 disagrees. Dr. Thompson's opinion does not identify any particular functional limitations, but
 7 instead describes deficits of unspecified severity. The ALJ did not err in finding this opinion less
 8 probative because of its generalities. *See Ford v. Saul*, 950 F.3d 1141, 1156 (9th Cir. 2020) ("Here,
 9 the ALJ found that Dr. Zipperman's descriptions of Ford's ability to perform in the workplace as
 10 'limited' or 'fair' were not useful because they failed to specify Ford's functional limits. Therefore,
 11 the ALJ could reasonably conclude these characterizations were inadequate for determining
 12 RFC.").

13 Sarah Kranick, M.D.

14 Dr. Kranick, a treating physician, completed a seizure questionnaire in July 2015. (AR
 15 440-45.) The ALJ referred to this opinion as one of "multiple DSHS examinations" that were
 16 completed in 2015 immediately after Plaintiff's hospitalization for seizures in the context of
 17 alcohol withdrawal, and explained that he discounted these opinions as inconsistent with later
 18 evidence showing that Plaintiff's seizures were well-controlled with medication. (AR 20.)

19 Plaintiff argues that the ALJ erred in discounting Dr. Kranick's opinion in light of
 20 subsequent control with medication, because the record does not actually show that Plaintiff's
 21 "small" seizures were well-controlled by medication.³ Dkt. 28 at 7. But Dr. Kranick's opinion
 22

23 ³ Plaintiff also argues that the ALJ erred in referring to Dr. Kranick's opinion as one of the DSHS
 examinations, given that Dr. Kranick was instead a treating physician. Dkt. 30 at 4. Dr. Kranick completed

1 referenced only “tonic clonic” seizures with loss of consciousness, not the small seizures that
2 Plaintiff reported continued to experience even with medication. (See AR 440-41.) The ALJ did
3 not err in finding that Dr. Kranick’s opinion, rendered shortly after Plaintiff’s hospitalization for
4 tonic clonic seizures in June 2015, was inconsistent with the remainder of the record, or in
5 discounting it on that basis. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (not
6 improper to reject an opinion presenting inconsistencies between the opinion and the medical
7 record).

8 Brent Packer, M.D.

9 Dr. Packer completed a review of medical evidence for DSHS in October 2015, reviewing
10 recent neurology records. (AR 425-27.) As was described *supra* with respect to Dr. Kranick’s
11 opinion, the ALJ referred to Dr. Packer’s opinion in a group of “DSHS examinations” that were
12 based on Plaintiff’s hospitalization for seizures in the context of alcohol withdrawal. (AR 20.)
13 The ALJ discounted these opinions as inconsistent with later evidence showing that Plaintiff’s
14 seizures were well-controlled with medication. (*Id.*)

15 As explained in the previous section, the ALJ did not err in finding that the seizures that
16 Plaintiff experienced in 2015 related to his alcohol withdrawal were tonic clonic seizures, and that
17 this type of seizure was subsequently well controlled with medication. Because Dr. Packer’s
18 opinion was inconsistent with the longitudinal record due to Plaintiff’s subsequent improvement,
19 the ALJ did not err in discounting Dr. Packer’s opinion. *See Tommasetti*, 533 F.3d at 1041.

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22 a form, however, which was reviewed by DSHS, and this opinion was indeed part of one exhibit consisting
23 of the evidence reviewed by DSHS. (AR 423-97.) Plaintiff has not shown that any harmful error resulted
from the ALJ’s reference to Dr. Kranick’s opinion in this group of evidence, given that the reason the ALJ
provided for discounting this group of evidence is legitimate with respect to Dr. Kranick’s opinion.

1 Christopher Edwards, Psy.D.

2 Dr. Edwards examined Plaintiff in June 2017 and wrote a narrative report describing
3 Plaintiff's psychological symptoms and limitations. (AR 822-27.) Dr. Edwards found Plaintiff's
4 remote memory to be mildly impaired, his social abilities to be mildly to moderately impaired, his
5 ability to maintain workplace attendance to be moderately impaired, his ability to complete a
6 normal workday/workweek to be moderately to significantly impaired, and his ability to deal with
7 workplace stress to be markedly impaired "due to fear of having unexpected seizures and anxiety
8 related to social interactions." (AR 826-27.) The ALJ gave significant weight to much of Dr.
9 Edwards' opinion, but discounted his opinion as to completing a normal workday/workweek and
10 handling stress as "inconsistent with the record which demonstrated no significant seizure activity
11 and no particular inability to perform daily activities due to 'stress[.]'" (AR 21 (citing AR 558-
12 64.).)

13 The ALJ pointed to Plaintiff's ability to complete his daily activities efficiently,
14 specifically his ability to manage his cooking, grocery shopping, laundry, and self care on his own
15 (AR 562), but these activities are not sufficiently similar to workplace activities to be legitimately
16 comparable. Thus, the ALJ erred in discounting Dr. Edwards' opinion on this basis and should
17 reconsider the opinion on remand.

18 Derek Leinenbach, M.D.

19 Dr. Leinenbach performed a review of some of Plaintiff's records for DSHS and completed
20 a form checkbox opinion describing his conclusions regarding Plaintiff's physical functioning.
21 (AR 981-83.) The ALJ gave little weight to Dr. Leinenbach's opinion because it did not cite any
22 specific evidence or explain the objective basis for the conclusions. (AR 21.)

23 Plaintiff argues that the ALJ erred in discounting Dr. Leinenbach's opinion as a checkbox

1 form, without explaining why it is unsupported by the record. Dkt. 28 at 16. But Plaintiff conflates
2 two separate lines of reasoning: the ALJ discounted Dr. Leinenbach's opinion as unexplained, not
3 as unsupported. Lack of explanation is a valid reason to discount a medical opinion. *See, e.g.*, 20
4 C.F.R. §§ 404.1527(c)(3), 416.927(c)(3) ("The more a medical source presents relevant evidence
5 to support an opinion, particularly medical signs and laboratory findings, the more weight we will
6 give that opinion. The better an explanation a source provides for an opinion, the more weight we
7 will give that opinion."). Accordingly, Plaintiff has not shown error in the ALJ's assessment of
8 Dr. Leinenbach's opinion.

9 Laura Hershkowitz, D.O.

10 Dr. Hershkowitz, a specialist in epilepsy, treated Plaintiff since the time of his
11 hospitalization in 2015 for seizures in the context of alcohol withdrawal, and completed form
12 opinions regarding the impact of Plaintiff's seizure disorder on his ability to work. (AR 817-19,
13 1187-90.) The ALJ noted that these form opinions did not reference Plaintiff's non-compliance
14 nor the link between Plaintiff's alcohol use and his seizures that was documented in Dr.
15 Hershkowitz's treatment notes. (AR 20.) For these reasons, the ALJ gave little weight to Dr.
16 Hershkowitz's form opinions. (*Id.*)

17 The ALJ's reasons are supported by substantial evidence in the record. Although Dr.
18 Hershkowitz indicated in the form opinions that Plaintiff was compliant with his medication (AR
19 1188) and that Plaintiff's seizures were not connected to alcohol use and that that alcohol treatment
20 was not recommended (AR 819), Dr. Hershkowitz's treatment notes indicate that she repeatedly
21 noted Plaintiff was not taking all medication prescribed, and consistently instructed him to stop
22 using alcohol and informed him that his seizures were caused by his use. (*See, e.g.*, AR 571 (Dr.
23 Hershkowitz tells Plaintiff it is "imperative" that he participate in alcohol rehabilitation), 572 ("I

1 again had a very frank discussion with [Plaintiff] that his seizures are not going to stay away until
2 he stops drinking.”), 574 (“I do think that he is going to need inpatient alcohol rehabilitation.”),
3 578 (“I had a long discussion with him about the importance of quitting alcohol completely.”), 583
4 (“I had a long discussion with him about the importance of him stopping alcohol completely.”),
5 1040 (“I again had a very frank discussion with him that he absolutely needs to stop drinking and
6 go into recovery. The seizures are harmful and life threatening and the alcoholism is compounding
7 this dramatically.”), 1086 (Plaintiff noted to be not taking his thiamine as prescribed), 1089 (same),
8 1127 (Dr. Hershkowitz again discussed his need for alcohol treatment because “he has very severe
9 health problems because of the drinking”), 1129 (“[Plaintiff] is not taking the thiamine that I asked
10 him to take.”.) These notes undermine Dr. Hershkowitz’s form opinion and the ALJ did not err in
11 discounting her opinions on that basis. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
12 2005) (rejecting physician’s opinion due to discrepancy or contradiction between opinion and the
13 physician’s own notes or observations is “a permissible determination within the ALJ’s
14 province.”).

15 Plaintiff argues that the ALJ erred in failing to consider the reasons why he did not comply
16 with his doctor’s instructions to stop using alcohol. Dkt. 28 at 11. The record does not suggest
17 any reason other than Plaintiff’s denial of a problem or lack of interest in treatment; at the hearing,
18 Plaintiff had been sober for the past six weeks and denied that his alcohol use impacted his seizures
19 at all. (AR 103-04.) Furthermore, the ALJ cited evidence of Plaintiff’s non-compliance for the
20 purpose of showing that the record was inconsistent with Dr. Hershkowitz’s opinions suggesting
21 that Plaintiff had been compliant; Plaintiff has not shown that any reasons for his non-compliance
22 could have explained away the inconsistency between Dr. Hershkowitz’s opinions and her own
23 treatment notes.

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL
PAGE - 10

1 Likewise, Plaintiff contends that even if he had stopped using alcohol, it would not have
 2 restored his ability to work. Dkt. 28 at 11-12. But again, this argument does not relate to the
 3 ALJ's reasoning: that Dr. Hershkowitz's form opinions fail to address how his seizures were linked
 4 to his continued alcohol use against medical advice. This argument fails to show error in the ALJ's
 5 stated reasons for discounting Dr. Hershkowitz's opinions.

6 Plaintiff also argues that the ALJ erred in failing to explicitly discuss a DSHS form wherein
 7 Dr. Hershkowitz wrote that Plaintiff was disabled due to his intractable epilepsy. Dkt. 28 at 10
 8 (citing AR 1120). This opinion pertains to an issue reserved to the Commissioner. *See* 20 C.F.R.
 9 § 416.927(d)(1) ("A statement by a medical source that you are 'disabled' or 'unable to work'
 10 does not mean that we will determine that you are disabled."). This conclusory sentence is not
 11 significant, probative evidence that the ALJ was required to explicitly address, and thus Plaintiff
 12 has not shown error in the ALJ's failure to address this sentence. *See Howard ex rel. Wolff v.*
 13 *Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) (ALJ "not required to discuss evidence that is
 14 neither significant nor probative").

15 Subjective symptom testimony

16 The ALJ discounted Plaintiff's subjective testimony describing disabling limitations
 17 because (1) the record shows that Plaintiff's limitations do not prevent all work, and (2) Plaintiff
 18 failed to seek mental health treatment and was "consistently non-compliant with medical advice
 19 with respect to his seizure disorder and alcohol dependency." (AR 20.) Plaintiff argues that these
 20 reasons are not clear and convincing, as required in the Ninth Circuit. *Burrell v. Colvin*, 775 F.3d
 21 1133, 1136-37 (9th Cir. 2014).

22 Plaintiff has failed to show that the ALJ erred in discounting his testimony on these bases.
 23 Plaintiff argues that the ALJ erred in finding that he failed to follow treatment recommendations

1 in continuing to use alcohol without considering why he did so, and whether following that
2 recommendation would have restored his ability to work. Dkt. 28 at 19. As discussed above,
3 however, Plaintiff has not shown that the record supports any legitimate reason justifying his
4 failure to stop using alcohol beyond his personal preference for continuing. Plaintiff's treating
5 doctors repeatedly instructed him to stop using alcohol and told him that his seizures were linked
6 to his alcohol use, and yet he declined to stop, as discussed above. Plaintiff has not shown that the
7 ALJ was unreasonable in finding that Plaintiff's lack of compliance with treatment
8 recommendations undermined his allegations of disabling limitations. *See Molina v. Astrue*, 674
9 F.3d 1104, 1113-14 (9th Cir. 2012).

10 Lay statements

11 The ALJ noted that Plaintiff's sister, Sheryl Whitcomb, provided two written statements,
12 but the ALJ discounted them as inconsistent with the medical record. (AR 21 (citing AR 351-60).)
13 An ALJ's reasons to discount a lay statement must be germane. *See Dodrill v. Shalala*, 12 F.3d
14 915, 919 (9th Cir. 1993) ("If the ALJ wishes to discount the testimony of the lay witnesses, he
15 must give reasons that are germane to each witness.").

16 Plaintiff argues that the ALJ erred in discounting Ms. Whitcomb's statements as
17 inconsistent with the medical record, because lack of support in the medical record is not a legally
18 sufficient reason. Dkt. 28 at 19. But the ALJ did not cite a lack of support, he cited inconsistency,
19 and inconsistency is a legally sufficient reason. *See Bayliss*, 427 F.3d at 1218. This reason is
20 supported by substantial evidence, because, as the ALJ detailed (AR 19), Plaintiff experienced
21 fewer and less severe seizures than described by Ms. Whitcomb. The ALJ did not err in
22 discounting Ms. Whitcomb's statement based on inconsistency with the record.

23 / / /

1 **CONCLUSION**

2 For the reasons set forth above, this matter is REVERSED and REMANDED for further
3 administrative proceedings. On remand, the ALJ shall assess the State agency opinions along with
4 Dr. Edwards' opinion, and either credit them or provide legally sufficient reasons to discount them.
5 The ALJ may reconsider any other part of the decision as necessary.

6 DATED this 13th day of May, 2020.

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8 _____
9 Mary Alice Theiler
United States Magistrate Judge